Supreme Court, U.S.
FILED
JAN 2 8 2015
OFFICE OF THE CLERK

No. 14-114

IN THE

Supreme Court of the United States

DAVID KING, ET AL.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF WILLIAM N. ESKRIDGE, JR., JOHN A. FEREJOHN, CHARLES FRIED, LISA MARSHALL MANHEIM, AND DAVID A. STRAUSS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

LAWRENCE S. ROBBINS
Counsel of Record
DANIEL N. LERMAN
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
lrobbins@robbinsrussell.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. TEXTUALISM REQUIRES COURTS TO READ STATUTORY LANGUAGE IN CONTEXT, NOT IN ISOLATION 6

A. The Textualist Response To Purposivism 6

B. Textualists Read The Words Of A Statute In Context—Not, As Some Critics Suggest, In Isolation 9

II. THE TEXT OF THE ACA, READ AS A WHOLE, AUTHORIZES TAX CREDITS ON THE FEDERAL EXCHANGES 13

A. The ACA Defines *All* Exchanges As Exchanges "Established By The State" 13

B. Petitioners Ignore Other Textualist Canons Of Construction 19

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Alaska Airlines, Inc. v. *Brock*,
480 U.S. 678 (1987).....20

Aldridge v. *Williams*,
44 U.S. (3 How.) 9 (1845).....8

Arlington Cent. Sch. Bd. of Educ. v. *Murphy*,
548 U.S. 291 (2006).....25

Batterton v. *Francis*,
432 U.S. 416 (1977).....26

Bond v. *United States*,
134 S. Ct. 2077 (2014).....26

Coeur Alaska, Inc. v. *Southeast Alaska Conservation Council*,
557 U.S. 261 (2009).....12

Davis v. *Mich. Dep't of Treasury*,
489 U.S. 803 (1989).....10, 12

Dep't of Revenue of Or. v. *ACF Indus., Inc.*,
510 U.S. 332 (1994).....14

Entergy Corp. v. *Riverkeeper, Inc.*,
556 U.S. 208 (2009).....14

FDA v. *Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000).....*passim*

Finley v. *United States*,
490 U.S. 545 (1989).....9

Gonzales v. *Oregon*,
546 U.S. 243 (2006).....17, 23, 27

TABLE OF AUTHORITIES—Cont'd

Page(s)

Graham County Soil & Water Conservation Dist. v. *United States*, 559 U.S. 280 (2010).....12

Green v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989).....11

Gustafson v. *Alloyd Co.*, 513 U.S. 561 (1995).....12

Halbig v. *Burwell*, 758 F.3d 390 (D.C. Cir. 2014).....14, 24

Holy Trinity Church v. *United States*, 143 U.S. 457 (1892).....6, 7

Hooper v. *California*, 155 U.S. 648 (1895).....20

ICC v. *Baird*, 194 U.S. 25 (1904).....6

INS v. *Chadha*, 462 U.S. 919 (1983).....7

King v. *Burwell*, 759 F.3d 358 (4th Cir. 2014) 20

King v. *St. Vincent's Hospital*, 502 U.S. 215 (1991).....18

National Federation of Independent Business v. *Sebelius*, 132 S. Ct. 2566 (2012).....20, 21

National R.R. Passenger Corp. v. *Boston & Maine Corp.*, 503 U.S. 407 (1992).....27

TABLE OF AUTHORITIES—Cont'd

Page(s)

New York Tel. Co. v. *New York State Dep't of Labor*,
440 U.S. 519 (1979).....26

New York Trust Co. v. *Comm'r*,
68 F.2d 19 (2d Cir. 1933).....12

Nken v. *Holder*,
556 U.S. 418 (2009).....12

Pennhurst State School & Hospital v. *Halderman*,
451 U.S. 1 (1981).....25

Public Citizen v. *U.S. Dep't of Justice*,
491 U.S. 440 (1989).....7, 8

Roberts v. *Sea-Land Services, Inc.*,
132 S. Ct. 1350 (2012).....19

Robinson v. *Shell Oil Co.*,
519 U.S. 337 (1997).....3, 10, 11, 12

Schwegmann Bros. v. *Calvert Distillers Corp.*,
341 U.S. 384 (1951).....7

United Savings Ass'n of Texas v. *Timbers of Inwood Forest Assocs.*,
484 U.S. 365 (1988).....4, 10, 19

Utility Air Regulatory Grp. v. *EPA*,
134 S. Ct. 2427 (2014).....3, 12, 27

W. Virginia Univ. Hospitals, Inc. v. *Casey*,
499 U.S. 83 (1991).....9

Whitman v. *Am. Trucking Ass'ns*,
531 U.S. 457 (2001).....5, 23, 24

TABLE OF AUTHORITIES—Cont'd

Page(s)

Wis. Dep't of Health & Family Servs. v. *Blumer*, 534 U.S. 473 (2002) 26, 27

Statutes

26 U.S.C. § 36B 2
26 U.S.C. § 36B(a) 13, 24
26 U.S.C. § 36B(b)(1) 13
26 U.S.C. § 36B(b)(2)(A) 14
26 U.S.C. § 36B(c)(1)(A) 16
26 U.S.C. § 36B(c)(2)(A)(i) 4, 13
26 U.S.C. § 36B(f)(3)(C) 16
42 U.S.C. § 1396a(gg)(1) 16, 26
42 U.S.C. § 1396w-3(b)(1)(B) 17
42 U.S.C. § 1397ee(d)(3)(B) 17
42 U.S.C. § 18031(b)(1) 14, 27
42 U.S.C. § 18031(d)(1) 15
42 U.S.C. § 18032(e)(2) 25
42 U.S.C. § 18032(f)(1) 18
42 U.S.C. § 18032(f)(1)(A)(ii) 17, 18
42 U.S.C. § 18041(b) 28
42 U.S.C. § 18041(c) 14, 28
42 U.S.C. § 2000e–3(a) 11

TABLE OF AUTHORITIES—Cont'd

Page(s)

42 U.S.C. § 300gg-91(d)(21) 15

Patient Protection and Affordable Care Act, Title I, Subtitle D, Part III, Pub. L. No. 111-148, 124 Stat. 119 25

Patient Protection and Affordable Care Act, Title I, Subtitle E, Pub. L. No. 111-148, 124 Stat. 119 21

Other Authorities

William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).....8

Oliver Wendell Holmes, COLLECTED LEGAL PAPERS (1920).....7

John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005).....6

John F Manning, *Textualism as a Nondelegation Doctrine*, 97 COL. L. REV. 673 (1997) 10

John F Manning, *What Divides Textualists from Purposivists?*, 106 COL. L. REV. 70 (2006) 7, 9, 10

William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992).....21

Antonin Scalia & Bryan A. Garner, READING LAW (2012) 8, 9, 20, 21

TABLE OF AUTHORITIES—Cont'd

Page(s)

Antonin Scalia, A MATTER OF INTERPRETATION (1997) 7, 9, 10

Lawrence M. Solan, *Learning our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235 (1997).....10

THE FEDERALIST NO. 78 (A. Hamilton) (C. Rossiter ed. 1961).....8

Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990) 9

BRIEF OF WILLIAM N. ESKRIDGE, JR., JOHN A. FEREJOHN, CHARLES FRIED, LISA MARSHALL MANHEIM, AND DAVID A. STRAUSS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*[1]

Amici are professors of law who teach and write about statutory interpretation, administrative law, and/or constitutional law. They have substantial expertise in litigation regarding federal statutes, and have written about various approaches to statutory and constitutional interpretation. Their legal expertise therefore bears directly on the interpretive issues before the Court in this case, which raises the question whether the text of the Patient Protection and Affordable Care Act authorizes federal tax credits for individuals who purchase health insurance on exchanges created by the federal government.

Amici include (institutional affiliations provided for identification purposes only):

- William N. Eskridge, Jr., John A. Garver Professor of Jurisprudence, Yale Law School;

---

[1] The parties have given blanket consent to the filing of *amicus curiae* briefs in support of either party. No counsel for a party has written this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person or entity, other than *amici* or their counsel, has made a monetary contribution to this brief's preparation or submission.

- John A. Ferejohn, Samuel Tilden Professor of Law, New York University School of Law;
- Charles Fried, Beneficial Professor of Law, Harvard Law School;
- Lisa Marshall Manheim, Assistant Professor of Law, University of Washington School of Law; and
- David A. Strauss, Gerald Ratner Distinguished Service Professor of Law, University of Chicago Law School.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals held that the Patient Protection and Affordable Care Act (ACA) does not prohibit the Internal Revenue Service (IRS) from providing tax credits to individuals who purchase health insurance on exchanges created by the Department of Health and Human Services (HHS). Petitioners challenge that conclusion on the sole ground that seven words in 26 U.S.C. § 36B—"established by the State under section 1311"—foreclose tax credits on HHS-created exchanges. The text, they say, is clear, so by holding otherwise, the court below elevated statutory purpose over statutory text.

But this is not, as Petitioners suggest, a case about textualism vs. purposivism. It is a case about good textual analysis vs. bad textual analysis. Textualism does not require courts to read statutory provisions in a vacuum. To the contrary, it is a "fundamental canon of statutory construction that

the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). By focusing exclusively on Section 36B's seven words in isolation, Petitioners violate textualism's core tenets and adopt an interpretation that would nullify the Act as a whole.

I. Modern textualism developed as a response to purposivism, which held that the letter of the law must yield to legislative "intent." A search for legislative intent, textualists have explained, violates the constitutionally prescribed process of bicameralism and presentment: The only "law" to interpret is the text of a statute passed by both houses of Congress and signed by the president. By combing the legislative history for indicia of legislative intent, moreover, purposivist analysis risks substituting judicial judgment for the judgment of Congress. Thus, by focusing on the text of a statute—rather than on ethereal notions of legislative "intent"—textualism cabins judicial discretion, respects legislative supremacy in the policymaking process, and renders the interpretive process more predictable.

But textualism is not hyperliteralism, and textualists do not read the words of a statute in a vacuum. To the contrary, "reasonable statutory interpretation must account for both 'the specific context in which . language is used' and 'the broader context of the statute as a whole.'" *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Thus, a statutory phrase that has

one apparent meaning when read in isolation may have a different meaning when read in the context of the statute as a whole.

II. Section 36B, which sets forth the formula for calculating tax credits under the Act, defines a "coverage month" as one in which the taxpayer is covered by a plan purchased through an "Exchange established by the State under section 1311." 26 U.S.C. § 36B(c)(2)(A)(i). Based solely on that provision, Petitioners contend that the ACA prohibits the IRS from providing tax credits to customers who purchase insurance through HHS-created exchanges. But Petitioners' crabbed reading does not hold up when Section 36B is read—as it must be—in its statutory context.

To begin with, the ACA's definitional provisions make clear that, when the HHS Secretary creates exchanges for states that elect not to do so, those exchanges are, by definition, exchanges "established by the State." That reading is supported by other provisions of the ACA that (1) refer to both state- and HHS-created exchanges as exchanges "established by the State," or (2) otherwise presume that federal tax credits are available on HHS-created exchanges.

Petitioners spill a lot of ink explaining why their interpretation of Section 36B would not render those other provisions of the Act wholly absurd. But when this Court said that statutory interpretation is a "holistic endeavor," *United Savings Ass'n of Texas* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988), it did not mean that judges should interpret words of a statute in isolation, and only then, after arriving at an interpretation, ask whether that interpretation would render other provisions absurd.

Rather, the directive that the "words of a statute must be read in their context," *Brown & Williamson*, 529 U.S. at 133, means just that: A provision must be read, in the first instance, in light of its statutory context. And when properly read in context, Section 36B does nothing to prohibit tax credits on HHS-created exchanges.

Petitioners' interpretation, moreover, ignores other venerable canons of construction that are rooted in the same separation-of-powers concerns that animate textualism as a whole. To begin with, courts do not read statutes in a way that would nullify a provision or the statute as a whole. But Petitioners would have this Court do just that. After all, it is undisputed that that the carefully calibrated incentives established by the ACA would collapse in the absence of federal subsidies.

Congress, moreover, does not alter fundamental details of a statutory scheme in "vague terms or ancillary provisions." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Petitioners, however, contend that Congress buried what is unquestionably a fundamental detail—the availability of federal tax credits—in an ancillary provision setting forth the formula for calculating the amount of tax credits.

Finally, courts presume that, when Congress puts conditions on states, it does so unambiguously. Section 36B scarcely qualifies as unambiguous notice to states that, if they elected not to establish their own exchanges, their citizens would lose out on the federal tax credits that serve as the cornerstone of the ACA as a whole. Indeed, Petitioners' interpretation undermines the principles of

cooperative federalism and state flexibility embodied in the Act.

ARGUMENT

I. TEXTUALISM REQUIRES COURTS TO READ STATUTORY LANGUAGE IN CONTEXT, NOT IN ISOLATION

A. The Textualist Response To Purposivism

This Court has often said that the overriding goal of statutory interpretation was to "ascertain the legislative intent" and "to effectuate the purposes of the lawmakers." *ICC* v. *Baird*, 194 U.S. 25, 38 (1904); see generally John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005). Some decisions of this Court went so far as to trump textual plain meaning based upon the Court's understanding of statutory purpose.

Holy Trinity Church v. *United States*, 143 U.S. 457 (1892), is the most prominent example of a purpose-trumps-text approach to statutory interpretation. There, the Court addressed whether a statute that made it unlawful to encourage the migration of "any alien" into the United States "to perform labor or service of any kind" barred a church from hiring an Englishman to move to the United States and serve as its pastor. *Id.* at 458. The Court conceded that the church's act fell within the "letter" of the statute. But the Court went on to explain that "a thing may be within the letter of the statute and yet not within the statute, because not within its *spirit* nor within the intention of its makers." *Id.* at 459 (emphasis added). Based on "the title of the act, the evil which was intended to be remedied, the

circumstances surrounding the appeal to congress, [and] the reports of the committee of each house," the Court held that "the intent of congress was simply to stay the influx of this cheap, unskilled labor"—not to prohibit the importation of skilled workers such as pastors. *Id.* at 465.

Modern textualism emerged as an antidote to this search for a statute's "spirit"—and the notion that the letter of the law must yield to the supposed intent of the legislators. *See Public Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 470-73 (1989) (Kennedy, J., concurring in the judgment) (criticizing *Holy Trinity* in favor of focused attention on plain meaning). In a nutshell, textualism holds that the "text is the law, and it is the text that must be observed." Antonin Scalia, A MATTER OF INTERPRETATION 22 (1997). Or, as Justice Holmes put it seventy-five years earlier: "We do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, COLLECTED LEGAL PAPERS 207 (1920), quoted in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951) (Jackson, J., concurring).

Textualism is rooted in several mutually reinforcing constitutional principles. First, "textualists emphasize[] that the statutory text alone has survived the constitutionally prescribed process of bicameralism and presentment." John F. Manning, *What Divides Textualists from Purposivists?*, 106 COL. L. REV. 70, 73 (2006). The bicameralism and presentment requirements "exemplify the concept of separation of powers" and are central to the constitutional scheme. *INS* v. *Chadha*, 462 U.S. 919, 946 (1983). Thus, the "law as

it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself." *Aldridge* v. *Williams*, 44 U.S. (3 How.) 9, 24 (1845). By relying on unenacted legislative "intent," purposivist analysis may disrespect the legislative process—and the supremacy of the legislature in policymaking.

Second, "[d]emocratic choice under the constitutional plan depends on interpretative methods that curtail judicial discretion." Frank H. Easterbrook, *Foreword* to Antonin Scalia & Bryan A. Garner, READING LAW xxii-xxiii (2012). By contrast, a search for congressional "intent," and cherry-picking snippets of legislative history, aggrandize judicial discretion. As the Founders recognized, such discretion enhances the "risk that the Court is exercising its own 'WILL instead of JUDGMENT,' with the consequence of 'substituti[ng] [its own] pleasure to that of the legislative body." *Public Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring) (quoting THE FEDERALIST NO. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961)). Focusing on the text of a statute, rather than disembodied legislative "intent," will "better constrain the tendency of judges to substitute their will for that of Congress." William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 674 (1990).

Third, textualism fosters the democratic process, not just by constraining unelected judges from projecting their policy preferences onto congressional enactments, but also by enabling Congress "to legislate against a background of clear interpretive rules, so that it may know the effect of the language

it adopts." *Finley* v. *United States*, 490 U.S. 545, 556 (1989). Consistent with that emphasis on predictability and objectivity in statutory interpretation, textualists embrace a number of interpretative canons as "background assumptions" against which Congress legislates. Manning, *What Divides Textualists from Purposivists?*, 106 COL. L. REV. at 82. Textualism therefore makes the interpretive process more predictable, promotes clearer drafting by the legislature, and fosters greater respect for the rule of law. See Scalia & Garner, READING LAW xxvii.

B. Textualists Read The Words Of A Statute In Context—Not, As Some Critics Suggest, In Isolation

Textualism, of course, is not without its critics, many of whom charge that is "simpleminded—'wooden,' 'unimaginative,' [and] 'pedestrian.'" Scalia, A MATTER OF INTERPRETATION 23. Thus, for example, some critics, including some judges, have lamented that textualism requires judges to don "thick grammarian's spectacles and ignore[] the available evidence of congressional purpose," *W. Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 113 (1991) (Stevens, J., dissenting), and to disregard the "context" necessary "to get meaning out of words," Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the*

1988-89 Term of the United States Supreme Court, 39 AM. U. L. REV. 277, 301 (1990).[2]

But textualists freely acknowledge that, "[i]n textual interpretation, *context is everything*." Scalia, A MATTER OF INTERPRETATION 37 (emphasis added). "Textualism is not literalism. Not even the most committed textualist would claim that statutory texts are inherently 'plain on their face.'" John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COL. L. REV. 673, 696 (1997). Rather, "modern textualists understand that the meaning of statutory language (like all language) depends wholly on context." Manning, *What Divides Textualists from Purposivists?*, 106 COL. L. REV. at 75.

And indeed, the Court has repeatedly made clear that "[s]tatutory construction * * * is a holistic endeavor." *United Savings Ass'n of Texas* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Accordingly, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Rather, it is a "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.* at 133 (quoting *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

Textualists do not just pay lip service to that core principle. In *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997), for example, the Court addressed whether the

---

[2] See also Lawrence M. Solan, *Learning our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 236 (1997) (criticizing textualism as "insufficiently sophisticated").

word "'employees'" in a statute that makes it unlawful for an employer to "'discriminate against any of his employees'" includes former employees. *Id.* at 339 (quoting 42 U.S.C. § 2000e–3(a)). Writing for a unanimous Court, Justice Thomas acknowledged that, [a]t first blush, the term 'employees' in § 704(a) would seem to refer to those having an existing employment relationship with the employer in question"—and not former employees. *Id.* at 341. But he went on to explain that the "plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Ibid.* Relying in part on the fact that other provisions of the statute use the term "employees" to include former employees, and pointing to the overall statutory purpose of the discrimination provisions at issue, the Court held that the term "employees" refers to former as well as current employees.[3]

Critics of textualism often conflate textualism with "strict" construction. But as the cases discussed above well illustrate, textualists *reject* hyperliteral or strict constructions of statutes. As Judge Learned Hand stated, "sterile literalism * * * loses sight of the

---

[3] Similarly, in *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 526-27 (1989), the Court held that the term "defendants" in Federal Rule of Evidence 609(a)(1) does not encompass *all* defendants, but rather referred only to "criminal defendant[s]." Concurring in the judgment, Justice Scalia explained that judges should ascribe to words the meaning that is "most in accord with context and ordinary usage," and that reading "defendant" to mean "criminal defendant" "does least violence to the text" as a whole. *Id.* at 528-29 (Scalia, J., concurring in the judgment).

forest for the trees." *New York Trust Co.* v. *Comm'r*, 68 F.2d 19, 20 (2d Cir. 1933). What textualism requires is a *reasonable* reading of a statute—not a cramped interpretation that turns a blind eye to common sense or statutory context. Textualism demands that judges take seriously the statutory design (as gathered from the text) and avoid interpretations that would render the statute unworkable. *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 276-77 (2009); see also *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("Although the State's hypertechnical reading of the nondiscrimination clause is not inconsistent with the language of that provision examined in isolation, statutory language cannot be construed in a vacuum.").

It is therefore black-letter law—for textualists and nontextualists alike—that "Courts have a 'duty to construe statutes, not isolated provisions.'" *Graham County Soil & Water Conservation Dist.* v. *United States*, 559 U.S. 280, 290 (2010) (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 568 (1995). "[R]easonable statutory interpretation must account for both 'the specific context in which . language is used' and 'the broader context of the statute as a whole.'" *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997); *Nken* v. *Holder*, 556 U.S. 418, 426, 430 (2009) ("The sun may be a star, but 'starry sky' does not refer to a bright summer day."). That bedrock principle, moreover, is compelled by the same separation-of-powers and judicial deference concerns that animate textualism itself. After all, true respect for Congress requires giving effect to the *statute* Congress enacted, not just isolated words divorced from their context.

II. THE TEXT OF THE ACA, READ AS A WHOLE, AUTHORIZES TAX CREDITS ON THE FEDERAL EXCHANGES

The government explains why the ACA authorizes the IRS to provide tax credits to consumers who purchase insurance through HHS-created exchanges. Here, we focus on how Petitioners fail to read Section 36B in the context of the ACA as a whole, advocate an interpretation that would render large portions of the Act ineffective, and themselves resort to purposive arguments that find no support in the text of the Act itself. In other words, although Petitioners invoke the mantle of textualism, they advance a decidedly nontextualist interpretation of the statute—with devastating consequences.

A. The ACA Defines *All* Exchanges As Exchanges "Established By The State"

Section 36B sets forth the formula for calculating tax credits under the Act. It provides for a tax credit "equal to the premium assistance credit amount," 26 U.S.C. § 36B(a), which is the sum of monthly assistance amounts for "all coverage months of the taxpayer" during the year, *id.* § 36B(b)(1). A "coverage month," in turn, is one in which the taxpayer is covered by a plan purchased through an "Exchange *established by the State under section 1311*." *Id.* § 36B(c)(2)(A)(i) (emphasis added). Based solely on those seven words, Petitioners assert that the ACA unambiguously prohibits tax credits to taxpayers who purchased their plans on HHS-

created exchanges.[4] See Pet. Br. 18. But that reading, "while plausible when viewed in isolation," is simply "untenable in light of [the statute] as a whole." *Dep't of Revenue of Or.* v. *ACF Indus., Inc.*, 510 U.S. 332, 343 (1994); see *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218-23 (2009).

Section 1311(b)(1) of the Act provides that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange * * * for the State." 42 U.S.C. § 18031(b)(1). Section 1322(c), in turn, provides that, if a state does not establish an exchange under Section 1311, the Secretary shall "establish and operate *such Exchange* within the State." 42 U.S.C. § 18041(c) (emphasis added). "Such Exchange," of course, *is* the "required exchange" that the state would have established under section 1311 (if it had elected to do so). Thus, as the government explains (at 23), when HHS creates an exchange, it does so as the surrogate of the state: HHS creates the very exchange that Section 1311 directs "[e]ach state" to establish.

That much should not be controversial. Indeed, in its vacated opinion in *Halbig* v. *Burwell*, 758 F.3d 390 (D.C. Cir. 2014), the D.C. Circuit conceded that the exchanges established by the Secretary pursuant to Section 1322 are, in fact, exchanges established "*under section 1311*"—the provision that requires states to establish exchanges. *Id.* at 400, *vacated*,

---

[4] Petitioners also cite Section 36B(b)(2)(A), which likewise defines the "premium assistance amount" by reference to the amount paid for a plan purchased on an "Exchange established by the State under [section] 1311." See Pet. Br. 19.

2014 WL 4627181 (D.C. Cir. Sept. 4, 2014) (emphasis added).

But the ACA's definitional provisions show that all exchanges established "under section 1311" are "Exchange[s] established by the State" for purposes of the Act. Section 1563(b) provides that "[t]he term 'Exchange' means an American Health Benefit Exchange established *under section [1311]* of this title." 42 U.S.C. § 300gg-91(d)(21) (emphasis added). And section 1311 provides that "[a]n Exchange shall be a governmental agency or nonprofit entity that is *established by a State*." 42 U.S.C. § 18031(d)(1) (emphasis added). Thus, as the government explains (at 23), the phrase "Exchange established by the State under section 1311" is a term of art: When the Secretary establishes Section 1311 exchanges, those exchanges are, by definition, exchanges "established by the State."[5]

Section 36B(a), moreover, expressly provides that premium tax credits "shall be allowed" to any "applicable taxpayer." "Applicable taxpayer," in

---

[5] Petitioners compare the ACA to a hypothetical statute that directs states to build airports, but then requires the federal government to construct such airports if the states fail to do so. Pet. Br. 22-23. According to Petitioners, such airports would not fairly be viewed as "state-constructed" airports. *Id.* at 23. But that just begs the question. If Petitioners' hypothetical statute expressly defined "state-constructed" airports to include airports constructed by the federal government on behalf of the states, then such airports would be "state-constructed," *within the meaning of the statute*. Here, as noted, Congress decided to use the phrase "established by the State under section 1311" to refer to both state- and HHS-created exchanges. Petitioners are not free to ignore Congress's definition just because it's not the definition that they would give to the same term.

turn, is defined as a taxpayer whose annual household income is between 100% and 400% of the federal poverty level. 26 U.S.C. § 36B(c)(1)(A). Section 36B(a) therefore sets forth the universe of "applicable taxpayers" eligible to receive tax credits without regard to who operates the exchange in the taxpayer's state.

That reading is supported by other provisions of the Act that refer to both state- and HHS-created exchanges as exchanges "established by the State" or that otherwise presume that federal tax credits are available on HHS-created exchanges. For example:

- Section 36B requires each exchange established under either section 1311 (the "state" exchanges) *or* 1322 (the "HHS" exchanges) to provide information to the IRS for use in administrating tax credits, including information about the "aggregate amount of any advance payment of such credit." 26 U.S.C. § 36B(f)(3)(C). Why would HHS-created exchanges be required to provide information regarding tax credits obtained by their customers if *none* of those customers were eligible for such credits in the first place?

- The Act prohibits a state from altering its Medicaid eligibility standards until "an Exchange established by the State under section [1311] of this title is fully operational." 42 U.S.C. § 1396a(gg)(1). Under Petitioners' view, states that decline to create an exchange can *never* alter their Medicaid eligibility standards, even after HHS creates an exchange for that state—and non-electing states that have changed their Medicaid eligibility standards are violating the Act.

- The ACA requires each state, as a condition of continued Medicaid funding, to ensure coordination between the State's Medicaid program, its Children's Health Insurance Program (CHIP), and the "Exchange established by the State." 42 U.S.C. § 1396w-3(b)(1)(B). The Act further provides that, in the event of a funding shortfall in the state's CHIP program, the state must enroll eligible children in coverage "offered through an Exchange established by the State." 42 U.S.C. § 1397ee(d)(3)(B). Under Petitioners' reading, a state that elects not to create an exchange cannot comply with these mandates—mandates that are necessary to ensure coverage of CHIP beneficiaries.

- The ACA defines a "qualified individual" as a person who "resides in the State that established the Exchange." 42 U.S.C. § 18032(f)(1)(A)(ii). According to Petitioners' theory, if a state elects not to establish an exchange, there are *no* individuals "qualified" to purchase coverage within that state. In other words, Petitioners assume that the HHS-created exchanges have *no* customers—a facially implausible assumption.

In short, Petitioners make a fundamental mistake when they give one provision a narrow reading "that is persuasive only to the extent one scrutinizes the provision without the illumination of the rest of the statute." *Gonzales* v. *Oregon*, 546 U.S. 243, 274 (2006).

Petitioners, of course, have answers to some of these textual arguments. For example, in response to the argument that their reading would mean that there are no "qualified individuals" on HHS-created

exchanges, Petitioners assert that the "qualified-individual definition *only* applies to *state* Exchanges, so it inherently cannot limit the individuals eligible for enrollment on HHS Exchanges." Pet. Br. 48.

Not so. The qualified-individual provision expressly states that, "*In this title*," the term "'qualified individual' means" an individual who "resides in the State that established the exchange." 42 U.S.C. §§ 18032(f)(1), (f)(1)(A)(ii). So Petitioners are simply wrong that the qualified-individual definition is limited to the state-created exchanges; the definition, by its express terms, applies to the entire Act.

As the government explains, Petitioners' responses to the other textual arguments outlined above likewise miss the mark. The broader problem, however, is not that Petitioners' responses to those provisions are unpersuasive; it's that they ignore the "cardinal rule that a statute is to be read as a whole," *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). Petitioners start—and end—by looking to Section 36B's seven words, and conclude that those seven words, read in isolation, unambiguously forbid the IRS from providing tax credits to customers who purchase plans on the HHS-created exchanges. To the extent that they look to the other provisions of the ACA at all, they do so only to ask whether those provisions would be rendered "patently absurd" under their theory. Pet. Br. 44 (internal quotation marks omitted).

But the whole-text canon doesn't authorize courts to interpret seven words in isolation and *then* ask whether that interpretation renders other statutory provisions absurd. Rather, courts must interpret a provision *in the first instance* in light its context and

place in the statutory scheme. Statutory construction, after all, is a "holistic endeavor." *United Savings*, 484 U.S. at 371. So the question here isn't just whether Petitioners' reading of Section 36B renders absurd the various provisions discussed above. Rather, the question is this: What does the ACA, read as a whole, say about tax credits when you take into account all its provisions?

And when you ask that question, the answer is clear. The ACA authorizes the Secretary to create "such Exchanges"—*i.e.*, exchanges established under Section 1311; it provides that *all* exchanges are "Exchange[s] established by the State"; it presumes that tax credits are available to consumers who purchase insurance on HHS-created exchanges; it uses the term "established by the State" in multiple provisions to encompass both state- and HHS-created exchanges; and it provides that tax credits shall be allowed to any "applicable taxpayer." Taken together, those provisions make abundantly clear that Section 36B's seven words do not prohibit tax credits on the federal exchanges. Petitioners reach a contrary conclusion only by construing Section 36B "in a vacuum." *Roberts* v. *Sea-Land Services, Inc.*, 132 S. Ct. 1350, 1357 (2012) (internal quotation marks omitted).

B. Petitioners Ignore Other Textualist Canons Of Construction

As noted, textualists embrace canons of construction that promote predictability and objectivity in statutory interpretation. These interpretative canons, like the whole-text canon discussed above, also promote the core separation-of-powers and legislative-supremacy concerns that

animate textualism writ large. Several such canons have particular resonance in this case.

First, "[t]he presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered." Scalia & Garner, READING LAW 63. Relatedly, the "presumption of validity disfavors interpretations that would nullify the provision or the entire instrument." *Id.* at 66. Simply put, respect for the legislative process requires judges to presume that Congress does not write statutes to fail.[6]

Here, there is no dispute that Petitioners' interpretation would gut the ACA. "[D]enying tax credits to individuals shopping on federal Exchanges would throw a debilitating wrench into the Act's internal economic machinery." *King* v. *Burwell*, 759 F.3d 358, 374 (4th Cir. 2014). Indeed, the joint dissent in *National Federation of Independent Business* v. *Sebelius* (*NFIB*) recognized that the system of incentives established by the ACA "collapses if the federal subsidies are invalidated":

---

[6] That fundamental principle underlies several other well-known interpretative doctrines. For example, the constitutional-doubt and constitutional-validity canons require judges to read statutes in a way that would avoid rendering them unconstitutional or that would raise serious questions about their constitutionality: "[E]very reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Hooper* v. *California*, 155 U.S. 648, 657 (1895). And the severability doctrine provides that, "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks omitted).

> Without the federal subsidies, individuals would lose the main incentive to purchase insurance inside the exchanges, and some insurers may be unwilling to offer insurance inside of exchanges. With fewer buyers and even fewer sellers, *the exchanges would not operate as Congress intended and may not operate at all.*

132 S. Ct. 2566, 2674 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (emphasis added).

Petitioners nevertheless dismiss such concerns as mere purposivism—and therefore assert that this Court should ignore the fact that their interpretation, if accepted, might well cause the statutory scheme to "collapse[]." *Ibid.*; see Pet. Br. 33. But it is a false (albeit common) critique to assert that textualism requires judges to "put on blinders that shield the legislative purpose from view." William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1142 (1992). That is because the "evident purpose of what a text seeks to achieve is an essential element of context that gives meaning to words." Scalia & Garner, READING LAW 20. And here, a central purpose of the ACA is to provide "Affordable Coverage Choices for All Americans." ACA Title I, Subtitle E, Pub. L. No. 111-148, 124 Stat. 119, 213. This Court should therefore reject Petitioners' interpretation, which turns a blind eye to the purpose of the ACA and would undermine the statutory scheme.

This Court should also reject Petitioners' efforts to justify their crabbed reading of Section 36B by reference to a statutory purpose that finds no

support whatever in the ACA's text. Petitioners' theory of the case—which they declare on page one of their brief—is that Congress prohibited tax credits to consumers on the federal exchanges in order to "encourage states to establish their own exchanges." Pet. Br. 1. In support of that theory, they cite a 2012 YouTube video of Jonathan Gruber, a consultant to HHS between 2009 and 2010, in which he said that states that failed to set up exchanges would lose tax credits for their citizens. Pet. Br. 4-5. They cite a report that two Committees of the House of Representatives issued in 2014—four years after the ACA's enactment. Pet. Br. 6. They cite a "pre-debate proposal by an influential expert" who suggested that Congress should "tie subsidies to state cooperation." Pet. Br. 16. And they cite newspaper articles published between 2010 and 2015. Pet Br. 4-5.

But Petitioners fail to cite any *textual* support for their remarkable assertion that Congress drafted Section 36B as a massive stick to coerce states into establishing their own exchanges. There is no "Gruber Exception" to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Brown & Williamson*, 529 U.S. at 133 (internal quotation marks omitted). Simply put, no amount of statements made years after the ACA was enacted can change that fact that the text of the Act, read as

a whole, authorizes tax subsidies for consumers who purchase plans on HHS-created exchanges.[7]

Second, "Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001); see *Gonzales*, 546 U.S. at 267. This Court applied that principle—in conjunction with the whole-text canon—in *FDA* v. *Brown & Williamson Tobacco Corp.*, which addressed whether the Food, Drug, and Cosmetic Act (FDCA) gives the Food and Drug Administration (FDA) authority to regulate tobacco products as "drugs" or drug-delivery devices. As the dissent in that case pointed out, the Court never disputed that nicotine qualifies as a "drug" under the FDCA's definition. 529 U.S. at 162 (Breyer, J., dissenting). The Court nevertheless held that the FDCA unambiguously foreclosed the FDA from regulating tobacco as a drug. *Id.* at 161.

In reaching that conclusion, the Court explained that "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.* at 132. Looking to the FDCA as a whole (which would require the FDA to pull cigarettes from the market if it had jurisdiction over tobacco products), and to subsequent congressional

---

[7] Petitioners' purposive theory also makes a hash of the structure of the statute: If Congress really intended the threat of withholding tax credits to encourage states to create exchanges, why would it *also* have authorized *federally* created exchanges at all? And to make matters more absurd, why would Congress have authorized federally created exchanges that, without tax credits, would inevitably fail?

enactments (which assumed that tobacco products would not be pulled from the market), the Court concluded that "it is plain that Congress has not given the FDA the authority" to regulate tobacco products. *Id.* at 161. Congress, the Court held, simply "could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160.

Here, there is no question that the availability of tax credits is a "fundamental detail[]" of the ACA's scheme. *Whitman*, 531 U.S. at 468. Yet Petitioners contend that Congress nevertheless chose to bar such credits to customers on federal exchanges through seven words buried in subsection (c)(2)(A) of a section of Subpart C of Part IV of Subtitle A of Chapter 1 of the Internal Revenue Code—the provision that sets forth the formula for calculating the amount of the federal tax credits that Section 36B itself makes available to *all* "applicable taxpayer[s]." 26 U.S.C. § 36B(a). That is quite a mousehole indeed.

In its vacated opinion in *Halbig*, the D.C. Circuit retorted that, even under the government's view, Section 36B "houses an elephant: namely, the rule that subsidies are only available for plans purchased through Exchanges." 758 F.3d at 401 n.4. But that's incorrect: The ACA repeatedly makes clear—outside Section 36B—that the subsidies are available only to taxpayers who purchase plans on exchanges. To take just one example, Section 1312 of the Act instructs the Secretary to establish procedures "to assist individuals in applying for premium tax credits and cost-sharing reductions for plans *sold*

through an Exchange." 42 U.S.C. § 18032(e)(2) (emphasis added).[8]

Third, when "Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981). Whether Congress in fact gave such "clear notice" is assessed from the perspective of the state official engaged in the process of deciding whether to accept the funds. *Arlington Cent. Sch. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006) Here, Petitioners themselves concede that, under their theory, the sole provision stripping federal tax credits from the state exchanges is Section 36B's reference to exchanges "established by the State under section 1311." That isolated statement scarcely qualifies as "unambiguous" notice to states that they would be cutting off tax credits for their citizens if they declined to create their own exchanges.

To the contrary, the ACA promised "State Flexibility Relating to Exchanges." ACA Title I, Subtitle D, Part III, Pub. L. No. 111-148, 124 Stat. 119, 186. And states were told that, if they elected not to establish an exchange under Section 1311, the Secretary would step in to establish "such Exchange"—that is, a substantively identical exchange—on behalf of the state. Yet Petitioners assert that that commitment to "state flexibility" was

---

[8] Note that Section 1312 not only provides that tax credits are available only to customers who purchase plans sold through exchanges; it expressly contemplates that such credits are available for *all* "plans sold through *an* Exchange"—not just exchanges "established by the State." 42 U.S.C. § 18032(e)(2) (emphasis added).

illusory because states that declined to create an exchange would (1) freeze their Medicaid eligibility requirement for all time, see 42 U.S.C. § 1396a(gg)(1), and (2) deny their citizens any federal subsidies for health insurance—subsidies that are integral to the overall statutory scheme.

Fourth, this Court has more generally recognized "background principles of construction * * * grounded in the relationship between the Federal Government and the States under our Constitution. *Bond* v. *United States*, 134 S. Ct. 2077, 2088 (2014). One such principle is the "presumption in favor of 'cooperative federalism.'" *New York Tel. Co.* v. *New York State Dep't of Labor*, 440 U.S. 519, 539 n.31 (1979) (plurality opinion) (quoting *Batterton* v. *Francis*, 432 U.S. 416, 431 (1977)). Thus, when a statute is designed to advance cooperative federalism, the Court has "not been reluctant to leave a range of permissible choices to the States"—particularly where, as here, "the superintending federal agency has concluded that such latitude is consistent with the statute's aims." *Wis. Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473, 495 (2002). Applying that presumption in *Batterton*, for example, this Court held that the Aid to Families with Dependent Children (AFDC) program (in which states could choose to participate) allowed states to maintain their own definitions of "unemployment"—and thus their own standard for eligibility in the AFDC program. 432 U.S. at 431-32.

The ACA, too, is designed to advance cooperative federalism: It allows states to create their own exchanges, but directs the federal government to step in to the shoes of states that elect not to do so. As noted, that choice is intended to promote "state

flexibility" under the Act. Petitioners' interpretation, however, does not "leave a range of permissible choices to the States." *Wis. Dep't of Health*, 534 U.S. at 495. According to Petitioners, the Act makes states an offer they cannot refuse: Create your own exchanges, or deprive your residents from receiving tax credits and destroy your state insurance markets. This Court should reject that interpretation, which undermines the principles of cooperative federalism and state "flexibility" enshrined in the ACA. See *Gonzales*, 546 U.S. at 270-72.

"Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context." *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 418 (1992). Plucking a handful of words out of context is especially problematic in the case of the ACA, which is "far from a *chef d'oeuvre* of legislative draftsmanship." *Utility Air*, 134 S. Ct. at 2441. Consider, for example, Section 1311, which provides that "[e]ach State *shall*" establish an exchange. 42 U.S.C. § 18031(b)(1) (emphasis added). That directive—read in isolation—could hardly be clearer: It is a requirement that states "shall" create exchanges. Yet both sides here agree that the ACA does not, in fact, require states to establish exchanges—*i.e.*, that Section 1311 does not mean what it literally says. How could that be?

To begin with, the literal reading of "shall" is untenable when read in the context of the Act as a whole. After all, Section 1321(a) of the Act provides that if a state does *not* "elect[]" to establish an exchange, the Secretary shall "establish and operate

such Exchange within the State" (42 U.S.C. §§ 18041 (b), (c))—evidence that the Act does not, in fact, require states to create exchanges. And the Act goes on to describe, in great detail, how the Secretary should go about creating "such" an exchange. Those provisions—and the federal exchanges themselves—would obviously be a nullity if states were required to establish exchanges.

A literal interpretation of Section 1311's "shall" directive would also raise serious constitutional questions. As Petitioners explain (at 2), core federalism constraints prohibit Congress from compelling states to create exchanges. Again, then, the canon against reading statutes to fail requires reading "shall" as hortatory rather than mandatory.

The issue in this case may be different in degree, but not in kind. The question here is whether seven words that have one apparent meaning when read in isolation—in this case, "established by the State under section 1311"—have the same meaning when read in their statutory context. And as discussed above, the answer to that question, like the answer to the "shall" question, is no: When read in context, those seven words do not prohibit the IRS from providing tax credits to consumers who purchase plans on federal exchanges.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted.

LAWRENCE S. ROBBINS
Counsel of Record
DANIEL N. LERMAN
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
lrobbins@robbinsrussell.com

January 28, 2015